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Duty Rules

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Few principles are more fundamentally important to modern society than duty. As obligation to oneself and others—to one's family, friends, neighbors, business associates, clients, customers, community, nation, and God—duty is the thread that binds humans to the world, to the communities in which they live. Duty constrains and channels human behavior in a socially responsible way before the fact, and it provides a basis for judging the propriety of behavior thereafter. Duty flows from millennia of social customs, philosophy, and religion. And duty is the overarching concept of the law.

Duty is central to the law of torts. Negligence law divides human choices to engage in (or refrain from) foreseeably harmful conduct as proper or improper, and choices are adjudged improper only if they involve a breach of duty. Thus, serving as the founda-

* Carolina Distinguished Professor of Law, University of South Carolina; Adviser and Editorial Adviser, *Restatement (Third) of Torts: Basic Principles*. This Essay is dedicated to the memory of Dean John Wade, one of America's great tort law commentators. Thanks to John Goldberg and Benjamin Zipursky for reinvigorating the tort law academy with this splendid symposium. Research, editorial, and technical assistance was provided by Nikki Lee, James Burns, and Michael Dirnbauer. Thanks also to Pat Hubbard to whom I owe no duty to refrain from poking fun.

tional element of a negligence claim, duty provides the front door to recovery for the principal cause of action in the law of torts: On the way to possible redress, every negligence claim must pass through the duty portal that bounds the scope of tort recovery for accidental harm. Yet in the draft *Restatement (Third) of Torts: General Principles*,[1] duty rules lie muffled, embedded in the negligence cause of action but excluded from recognition as a formal element.

Assessing whether the *Restatement* adequately describes the role of duty in the law of negligence requires study of two significant works of scholarship: a "discussion draft" of many basic negligence law principles in the *Restatement (Third)*, authored by Reporter Gary Schwartz,[2] and an important article by Professors John Goldberg and Benjamin Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*.[3] The draft *Restatement*'s formulation of the negligence cause of action excludes duty as a black-letter element in the formal definition, ignoring its conventional position as the initial element of such claims. Decrying the relegation of duty to secondary status, Goldberg and Zipursky challenge the draft *Restatement*'s failure to capture duty's vital role in the vast majority of American jurisdictions in which it is the threshold element of the tort of negligence.[4]

This Essay briefly examines the role of duty in negligence law and the rules that define that role. The debate over how the *Restatement (Third)* should treat the duty concept is at once conceptual, doctrinal, and practical. The strength accorded the duty/no-duty issue is conceptually important because it defines the extent to which the law of torts holds people accountable for their damaging misdeeds. In duty rulings, negligence law balances the interests of certain classes of potential victims in security from certain types of

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1. Unless otherwise noted, references herein to drafts of the *Restatement* are to the *Restatement (Third) of Torts: General Principles* (Discussion Draft) ("Discussion Draft"). The title of the Restatement project has now changed to *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*. *See* Calendar of Meetings (ALI & ALI-ABA, Jan. 8, 2001).

2. Appointed in 1996, Professor Schwartz was the sole original Reporter of the *Restatement (Third) of Torts: General Principles* and was the sole author of the Discussion Draft, which contains the most recent formulation of the duty rules discussed herein. Serving briefly as a co-Reporter in 2000, Professor Harvey Perlman prepared for discussion purposes a formulation of the duty concept that was quite different from that set forth by Professor Schwartz. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Preliminary Draft No. 2, May 10, 2000) [hereinafter Preliminary Draft No. 2]. Later in the year, Professor Perlman's academic obligations precluded him from continuing work on the project, and Professor Michael Green was appointed to serve as co-Reporter to Professor Schwartz.

3. John C. P. Goldberg & Benjamin C. Zipursky, *The Third Restatement and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001).

4. *Id.* at 658-60.

harm against certain interests of certain classes of actors in freedom of action. This balance of interests controls the extent to which courts close the door on major types of problems lying at the edge of tort law or pass these border problems through to juries for preliminary determination. Once the proper role of duty in negligence law is resolved conceptually, duty and no-duty rules must be formulated for use by judges, jurors, and lawyers counseling actors and victims. How strongly duty rules are defined will control the extent to which negligence lawsuits of various types are allowed to proceed or are summarily ejected from the judicial system. In short, weaker no-duty rules funnel more disputes at the margin of negligence law into local courtrooms for redress while stronger no-duty rules force the victims of such disputes to seek relief from institutions other than the courts, such as from private and public insurance.

Exploring the tug between strong and weak duty rules, this Essay concludes that duty is properly conceived as the primary element of a negligence claim, a position of importance that the draft *Restatement* fails almost entirely to capture. Although duty's strength in most negligence cases lies embedded and untapped, it contains a robust power that, like a sleeping giant, often must be called upon at the margin of the law of torts to determine the proper scope of this area of the law. Duty rules, this Essay concludes, should reflect this vital fact.

I. DUTY RULES IN NEGLIGENCE LAW

A. In General

Duty has always been the central glue of law. But the term "duty," like "negligence," has evolved in meaning and still today is understood in different ways.[5] Indeed, two different meanings of "negligence" help explain the current debate on the role of duty in negligence law. Until the negligence cause of action began to develop during the late eighteenth and early nineteenth centuries,[6] the term negligence was used loosely to describe unlawful

5. *See generally* Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934) (exploring the meaning of duty and its origins as a requisite for liability in negligence to determine whether it serves a "useful function"). On the differing meanings of "duty," *see* Goldberg & Zipursky, *supra* note 3, at 661-62, 666-67.

6. *See* Winfield, *supra* note 5, at 49.

behavior.[7] Once the negligence cause of action arose, "negligence" took on another meaning—a tort[8] defined by four (or five) elements: duty, breach, cause (including cause in fact and proximate cause), and damage.[9] In this classic definition of the tort of negligence, duty sits at the front of the list of elements. Yet, consistent with its historical origins and lay usage, "negligence" is commonly understood as well to denote merely the second element of the negligence cause of action—breach (of duty). In this second usage, negligence is often defined in terms of failing to exercise reasonable care, or something similar. This *misconduct* definition of negligence-as-behavior is no less correct than the definition of the *tort* of negligence, but the narrower concept it describes is merely a member of the set of elements that comprise negligence in its broader cause of action form.

Like negligence, the term "duty" also has two basic meanings, one broad and the other narrow.[10] Over the millennia, from at least the time of ancient Rome, "duty" was broadly understood to mean legal obligation.[11] In the late nineteenth century, Oliver Wendell Holmes viewed law generally in this manner as an expression of various duties.[12] In this broad sense, "duty" may be conceived as the equivalent of "law." From this perspective, duty is the

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7. *See generally* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON TORTS § 28, at 160-61 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

8. Negligence is now the "dominant cause of action for accidental injury in this nation today." *Id.* at 161.

9. *See id.* § 30, 164-65 (specifying four elements of the prima facie case for negligence, combining cause in fact and proximate causation); DAN B. DOBBS, THE LAW OF TORTS § 114, at 269 (2000) (specifying five elements, separating the two causation elements). Defining negligence in terms of these elements is long established. *See, e.g.*, Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1022 (1928) (setting forth four elements).

10. In addition to the two basic meanings of duty, there are others. *See* PROSSER & KEETON ON TORTS, *supra* note 7, § 53, at 356-58; Goldberg and Zipursky, *supra* note 3, at 692-97.

11. While the Roman law of *delict* bore little resemblance to modern tort law, the modern concept of duty in tort law may be loosely traced to the Roman law of obligations, which included both tort and contract law. *See* WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 386-545 (1938).

12. For Holmes' rather strained attempt to understand all of law in terms of duty, see Oliver W. Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), *reprinted in* 44 HARV. L. REV. 725, 727 (1931), and *The Theory of Torts*, 7 AM. L. REV. 652 (1873), *reprinted in* 44 HARV. L. REV. 773, 781-84 (1931). *But see* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 471-72 (1897) (reasoning that general tort responsibility is subject to limitations on "special grounds of policy," but refusing to formalize this "tendency" in terms of correlative rights and duties). Other early tort law commentators viewed tort law broadly in terms of breach of duty. *See, e.g.*, CHARLES A. RAY, MELVILLE MADISON BIGELOW, THE LAW OF TORTS §§ 1, 4-5 (8th ed. 1907); NEGLIGENCE OF IMPOSED DUTIES, PERSONAL (1891).

flip side of right,[13] and the two define the realm of freedoms—of action and security—possessed by persons of conflicting interests in society.[14] In early English law, duties related to what we now call tort law were defined with some particularity by forms of action specifying certain obligations of persons involved in public callings, public office, bailments, and in controlling dangerous things.[15] As a cause of action for negligence developed during the nineteenth century, common law judges sought a source for legal obligation, turning both to contract[16] and to statute,[17] and only slowly, and for want of a firmer base, to the common law.

Duty did not emerge as a "consciously technical term" in the common law of negligence until the middle of the nineteenth century.[18] The fountainhead case in which duty became "firmly fixed"[19] in negligence law was *Heaven v. Pender*,[20] decided by the British Court of Appeal in 1883. A ship painter was injured in the collapse of a defective scaffold supplied by the owner of the dock where the ship was located. The painter brought a negligence action against the dock owner who defended the case on the principle of *Winterbottom v. Wright*, contending that it had no duty to the plaintiff because its only contract was with the ship owner with whom the

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13. *See, e.g.*, JOHN AUSTIN, LECTURES ON JURISPRUDENCE (3d ed. 1869), *reprinted in* READINGS IN JURISPRUDENCE 455 n.6 (Jerome Hall ed., 1938) (stating that "a duty without a correlative claim (or right) is impossible and, therefore, unthinkable") (quoting Kocourek, *Analytic Jurisprudence Since John Austin*, *in* 2 LAW–A CENTURY OF PROGRESS 201 (1937)); BIGELOW, *supra* note 12, at 36 (noting that "whether we speak of the breach, by the defendant, of the plaintiff's right, or of the defendant's duty to respect that right, it comes to the same thing; the breach by the defendant of the plaintiff's legal right is a breach of the defendant's duty"); George W. Goble, *A Definition of Basic Legal Terms*, 35 COLUM. L. REV. 535 (1935) (discussing the right-duty relation in the Hohfeldian system of juristic terminology), *reprinted in* READINGS OF JURISPRUDENCE, *supra*, at 509, 520-21; Henry T. Terry, *Duties, Rights and Wrongs*, 10 A.B.A. J. 123 (1924), *reprinted in* READINGS IN JURISPRUDENCE, *supra*, at 460 ("When one person is subject to a duty to another to do or not to do a certain act, that other has a right to have the act done or not done."). For a more recent example, see JOSEPH RAZ, THE MORALITY OF FREEDOM 167 (1986) ("Rights are grounds of duties in others.").

14. *See, e.g.*, Winfield, *supra* note 5, at 42-43 (citing 1 THOMAS BEVEN, NEGLIGENCE IN LAW 7-8 (4th ed. 1928)). *See generally* ALAN CALNAN, JUSTICE AND TORT LAW 126 (1997) (noting that "both risk-creators *and* risk-receivers bear a complement of rights and duties"). The right-duty linkage is closely connected to Professor Weinrib's rigorous model of corrective justice as featuring an intrinsic moral connection between the doing and suffering of harm. *See* Ernest J. Weinrib, THE IDEA OF PRIVATE LAW 145-70 (1995); Ernest J. Weinrib, *The Passing of* Palsgraf, 54 VAND. L. REV. 803, 805-06 (2001).

15. *See, e.g.*, Winfield, *supra* note 5, at 44-49.

16. The classic case in which duty in negligence law was thought to rest on contract was *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

17. *See* Winfield, *supra* note 5, at 56-57.

18. *Id.* at 65. Its emergence has been characterized as "a historical accident." *Id.* at 66.

19. *Id.* at 57.

20. Heaven v. Pender, 11 Q.B.D. 503 (1883).

plaintiff's employer contracted to paint the ship. Reversing the Divisional Court,[21] the Court of Appeal allowed the claim. Noting that the defendant had not contested its carelessness in allowing the scaffolding to fall into disrepair, Brett, M.R., observed that "want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question."[22] As to the kind of circumstances that would give rise to such a duty, Brett, M.R., broadly observed in a renowned passage:

> The proposition . . . is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[23]

So stated, the duty element of the negligence cause of action is commensurate with the reach of the second, negligence-as-breach (misconduct) element of the cause of action. Under this view, conduct would be a *breach* of duty simply if it exposed a foreseeable plaintiff to a foreseeable risk of harm. In both law and ethics, it is of course fundamental that conduct posing no foreseeable risks of harm cannot be blamed.[24] But the converse is not always true: Negligently harming foreseeable victims does not always give rise to a negligence cause of action. Duty is a much richer notion than foreseeability, and *Heaven v. Pender*'s implication that a person's duty to exercise due care is limited only by foreseeability is simply wrong. The approach of Brett, M.R., in *Heaven v. Pender* would transform duty into a hollow shell, a useless element of the negligence cause of action which mischievously would require courts and juries to reexamine in the second (negligence-as-misconduct) ele-

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21. Heaven v. Pender, 9 Q.B.D. 302 (1882).

22. *Heaven*, 11 Q.B. at 507. Brett, M.R., continued:

> Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.

Id.

23. *Id.* at 509.

24. *See, e.g.*, Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd., A.C. 388, 423 (P.C. 1961) ("Wagon Mound No. 1") ("It is a principle of civil liability . . . that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule . . . .").

ment issues already examined and resolved in the first.[25] But even Brett, M.R. (Lord Esher, after obtaining a peerage), in time appeared to acquire a stronger view of the role of duty.[26]

Once negligence law substantially took shape during the nineteenth century, courts and commentators began to recognize the important function of the duty/no-duty element as a limitation on the types of cases for which the negligence cause of action was appropriate.[27] Among the many recurring categories of cases in which courts have come to understand that negligent conduct (negligence-as-breach) should not always give rise to liability, even when the plaintiff and the risk were both entirely foreseeable, are claims involving injuries to third persons (by manufacturers,[28] professionals,[29] employers,[30] social hosts providing guests with alcohol,[31] and probation officers[32]), harm to unborn plaintiffs,[33] nonfeasance (involving the extent of a duty to rescue or otherwise affirmatively to act),[34] landowner liability (to trespassers and other uninvited guests),[35] and damage to nonphysical interests (especially

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25. For an early recognition of the weaknesses in Brett, M.R.'s approach in *Heaven*, see 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 94 (1906) ("There is something essentially strained and artificial in the conception of a duty to use care to avoid harm as regards the world . . . ."). Percy Winfield questioned the usefulness of a formal duty notion, Winfield, *supra* note 5, at 43 & 58-66, but he concluded that it had become too deeply ingrained in the law simply to expunge. *Id.* at 66.

26. *See* Lane v. Cox, 1 Q.B. 415, 417 (1897) ("A person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected."); *see also* Le Lievre v. Gould, 1 Q.B. 491, 497 (1893) ("A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.").

27. *See generally* PROSSER & KEETON ON TORTS, *supra* note 7, ch. 9 (examining established no-duty categories of negligence law).

28. *See, e.g.*, Reyes v. Wyeth Lab., 498 F.2d 1264, 1276 (5th Cir. 1974) (holding that manufacturer of prescription drug has no duty to warn ultimate purchaser in addition to physician).

29. *See, e.g.*, Kirk v. Michael Reese Hosp., 513 N.E.2d 387, 397 (Ill. 1987) (ruling that hospital and doctors had no duty to third party (passenger of car), injured as a result of defendants' failure to warn patient (driver), not to drink and drive after taking prescribed drug).

30. *See, e.g.*, Homer v. Pabst Brewing Co., 806 F.2d 119, 123 (7th Cir. 1986) (holding that defendant employer had no duty to truck driver injured by defendant's employee driving home ill from work).

31. *See, e.g.*, Overbaugh v. McCutcheon, 396 S.E.2d 153, 158 (W. Va. 1990) (ruling that social host who provides liquor to guest has no duty to third parties injured by intoxicated driving of former guest).

32. *See, e.g.*, Lamb v. Hopkins, 492 A.2d 1297, 1305-06 (Md. 1985) (holding that probation officer had no duty to third parties to prevent probationer from driving under the influence).

33. *See, e.g.*, Endresz v. Friedberg, 248 N.E.2d 901, 906-07 (N.Y. 1969) (holding that there is no duty under wrongful death act to avoid negligently killing fetuses of pregnant woman involved in car accident).

34. *See, e.g.*, Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (finding no duty to rescue drowning person who jumped into pit of water).

35. *See, e.g.*, Wolf v. Nat'l R.R. Passenger Corp., 697 A.2d 1082, 1086 (R.I. 1997) (ruling that landowner has no duty of reasonable care toward trespassers).

emotional harm[36] and pure economic loss[37]). In contexts such as these, where the appropriateness of allowing recovery under the law of negligence is unclear, twentieth century courts came to recognize the importance of duty's threshold, gatekeeper role.[38]

B. The Ebb and Flow of Duty

Until about 1960, courts closely guarded the house of negligence from various types of intrusion by large categories of foreseeable victims across the realm of accident law, from medical patients and land entrants to victims of product accidents and guest passengers in automobiles. One simple example that barred large categories of negligence claims in both landowner and products liability cases was the obvious danger rule: Landowners[39] and manufacturers[40] simply had no duty, even if they were careless toward foreseeable land entrants and consumers, to act with reasonable care to protect such persons from harm from obviously dangerous conditions. Through rigorously applied no-duty rules, courts closely controlled what categories of defendants, plaintiffs, wrongdoing, and damages would be cognizable under the law of negligence. Doctors and other professionals were subjected to liability only for the clearest affirmative failures of professional responsibility; third parties, no matter how foreseeable, often were deemed outside negligence doctrine; and the damages branch of negligence found little room for emotional distress or pure economic loss.

During the expansionary phase of tort law, beginning roughly in 1960 (the year John F. Kennedy was elected President), duty limitations were increasingly shoved aside as political power shifted from actors (often institutions, professionals, and landowners) to victims.[41] For example, during this period courts imposed

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36. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989) (en banc) (ruling that, with certain exceptions, there is no duty to protect bystanders against negligently inflicted emotional distress).

37. *See, e.g.*, Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1024 (5th Cir. 1985) (en banc) (refusing to allow recovery under tort in absence of physical damage to a proprietary interest).

38. *See generally* PROSSER & KEETON ON TORTS, *supra* note 7, ch. 9.

39. *See, e.g.*, Sherman v. Platte County, 642 P.2d 787, 789-90 (Wyo. 1982) (ruling that longstanding "obvious danger no-duty" rule is not abrogated by adoption of comparative negligence).

40. *See, e.g.*, Campo v. Scofield, 95 N.E.2d 802, 804 (N.Y. 1950) (holding that manufacturers have no duty to guard against obvious product dangers).

41. This development is ably chronicled in Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992). This expansionary

duties on doctors for wrongful birth[42] and for providing patients with informed consent,[43] strengthened the duties owed by owners and occupiers of land to persons entering the premises,[44] and abandoned the impact doctrine as a limitation on recovery for emotional distress.[45] But the largest breach in the duty dam lay in the law of products liability, where tort law in the 1960s appeared to jettison foreseeability itself as a limiting factor to recovery in the doctrine of "strict" products liability in tort.[46] This populist widening of the gates of tort law, of course, was accomplished by narrowing the role of duty as an exclusionary device and returning to Brett, M.R.'s broad vision of duty as limited only by, and hence coincident with, the doctrine of foreseeability. With few exceptions,[47] the commentators applauded or at least accepted the legitimacy of these expansionary developments, and the trampling of the duty limitation that they necessarily entailed.[48]

Coincident with the election of Ronald Reagan to the Presidency in 1980, the expansionary period of tort law came to a rather screeching halt. Courts and commentators increasingly began to recognize the perils of the previous generation's failure to focus on the proper *limits* of tort law—on its failure to understand that tort law, like almost everything, is an evil in excess.[49] Providing limitations on the reach of negligence and other types of tort claims is of course the basic office of the duty/no-duty concept, so that the beginning point of duty's resurgence may itself be fairly dated at about 1980. An important early example of this development was the New Jersey Supreme Court's repudiation, in 1984, of the idea that foreseeability should be excluded as a limiting principle under the doctrine of "strict" products liability in tort.[50] Transformed vir-

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period of tort law was marked by "duty skepticism," an apt term coined by Professors Goldberg and Zipursky. Goldberg and Zipursky, *supra* note 3, at 692-97.

42. *See, e.g.*, Berman v. Allan, 404 A.2d 8, 14-15 (N.J. 1979).

43. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972).

44. *See, e.g.*, Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

45. *See, e.g.*, Sears, Roebuck & Co. v. Young, 384 So. 2d 69, 72-73 (Miss. 1980).

46. This story is recounted in detail in 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY LAW §§ 10:4-10:8 (3d ed. 2000).

47. Most explicitly decrying the breakdown of duty-limitation doctrine during this period was James A. Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467 (1976).

48. An examination of any random selection of the academic literature of the late 1960s and 1970s illustrates this point.

49. *See* David G. Owen, *Respect for Law and Man: The Tort Law of Chief Justice Frank Rowe Kenison*, 11 VT. L. REV. 389, 407 (1986).

50. *See* Feldman v. Lederle Labs., 479 A.2d 374, 387-88 (N.J. 1984) (holding that a manufacturer of pharmaceutical drugs has no duty to warn of unforeseeable risks). *Feldman v. Lederle Laboratories* effectively overruled *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539

tually overnight from leading the nation's expansion of tort law to leading its retreat,[51] the California Supreme Court in 1989 clamped down on the scope of recovery for third-party emotional distress, converting its broad foreseeability guidelines into a crystallized rule of law.[52] During the 1980s and 1990s, in one context after another, courts increasingly turned away from simple foreseeability to some enriched version of duty in helping decide the proper limits on tort responsibility. As the twentieth century drew to a close, the increasing control by no-duty and limited-duty principles over the reach of tort law was widely, although by no means universally, endorsed by the commentators.[53]

So, what is the proper role of the duty concept in tort law, expansionary or restrictive? Does the juxtaposition of conflicting phases of tort law development—the expansionary period of 1960-1980 and the contracting period of 1980-2000—reveal that duty rules are so fickle, unprincipled, and incoherent that the duty element is incapable of providing a meaningful gate-keeping role? Any answer to this question must recognize that duty, much like proximate cause,[54] is enormously rich, so rich that a judge (or commentator) not equipped with a well-ordered box of jurisprudential tools can assign this tort law element either an expansionary or a restrictive role.

Depending on the issue, duty determinations may call upon every possible reason of fairness, justice, and social policy. The words of one court mirror the thoughts of many others:

> An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other. Inherent in this simple description are various

(N.J. 1982), which had held that manufacturers of asbestos products have a duty to warn of unforeseeable risks. The California Supreme Court followed the *Feldman* approach in *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988) (pharmaceutical drugs), and extended the principle to products generally in *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549, 555 (Cal. 1991) (asbestos products).

51. *See generally*, Schwartz, *supra* note 41 (providing a review of these developments).

52. *See* Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989) (en banc) (holding that, in order to recover for third party emotional distress, a plaintiff must (1) be closely related to injury victim; (2) be present at the scene of injury-producing event; and (3) suffer serious emotional distress). Abandoning foreseeability guidelines in favor of duty rules, the court remarked: "Experience has shown that . . . there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 830.

53. *See, e.g.*, David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699 (1997).

54. "Proximate cause" is used here in the narrow sense of legal cause, as opposed to cause in fact.

> and sometimes delicate policy judgments. The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; in the case of a public agency defendant, the extent of its powers, the role imposed upon it by law and the limitations imposed upon it by budget; and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty.[55]

Yet, as broad and disparate as are the relevant considerations, duty determinations are not discretionary tools for judges to decide how wide or narrow the law of negligence should be based upon their personal predilections. Instead, duty judgments, rendered on a categorical (rather than case-specific) basis,[56] should rest upon a solid jurisprudential foundation constructed on ordered principles of law. Duty has an internal moral compass that, on the one hand, defines certain harmful behavior as wrong, but which, on the other, defines other harmful behavior as lawful and beyond the proper reach of law. Thus, duty in the abstract is neither expansionary nor restrictive; its realm in every instance rests upon a deliberative balance of the relevant, oft-competing considerations. In practice, however, duty's function is principally restrictive or exclusionary in that it defines the scope and outer limits of the law of negligence; in other words, it provides in other words, negligence law with borders.

During periods of duty skepticism, courts have sometimes attempted to replace duty with one of two surrogates for limiting recovery in negligence law: foreseeability or proximate cause. While both of these concepts also properly limit the scope of negligence law, neither fulfills the office of duty. The proper function of the doctrine of proximate cause involves a morass of complex considerations beyond the scope of the present Essay, and its role and scope is treated elsewhere in this Symposium.[57] Suffice it here to provide summaries of two related explanations for why duty should be kept

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55. Raymond v. Paradise Unified Sch. Dist., 31 Cal. Rptr. 847, 851-52 (Cal. Ct. App. 1963).

56. *See* Discussion Draft, *supra* note 1, § 6 cmt. h.

57. *See generally* Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 VAND. L. REV. 1011 (2001) (providing substantial examination of proximate cause); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAN. L. REV. 1039 (2001) (same); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001) (same); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071 (2001) (same).

distinct from proximate cause, for why the functions of these two separate elements of the law of negligence should not be conflated. First is the basic difference in the functions served by these two doctrines, both of limitation and exclusion but of quite different types. Courts apply duty rules (as a matter of law) to exclude negligence claims when basic moral values and social policies dictate that actors, at a categorical level, ought not be subject to the normal reach of negligence responsibility. By contrast, juries decide (as a matter of fact) whether a particular breach of duty (once the court has determined that such a duty did exist) was associated closely enough with the plaintiff's particular harm to render it fair, under the particular circumstances of the case, to hold the defendant responsible for the loss.[58] Second, to heap the heavy load of "special problems of principle and policy" involved in duty decision making upon the "proximity" issue, which frequently is overburdened with its own morass of fairness problems, would result in a confusing (and unnecessary) mix of category apples with particular oranges.

Not infrequently in the expansionary period of tort law during 1960-1980, courts subtly turned to foreseeability as a silent surrogate for duty.[59] No doubt, foreseeability is a fundamentally important factor in limiting tort responsibility to losses for which actors are morally responsible. In general, actors are morally accountable only for risks of harm they do or reasonably should contemplate at the time of acting, for the propriety of an actor's choices may be fairly judged only upon the facts and reasons that were or should have been within the actor's possession at the time the choice was made. If an actor causes harm of a type or to a person outside the orbit of reasonable prevision,[60] the unforeseeable results are not attributable to the actor's will. In situations of this kind, the actor cannot be blamed for the harmful consequences of the act. So, foreseeability, a key component of both negligence-as-breach (negligent behavior) and proximate causation, is a crucial limitation on the negligence cause of action.

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58. Professor Leon Green was particularly concerned with, and best explained, these respective roles of judge and jury in adjudicating duty and proximate cause. *See* Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 562-72 (1962); Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, *passim* (1928); Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-20 (1961).

59. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 924-25 (Cal. 1968) (replacing no-duty rule for emotional distress of bystanders outside the zone of danger with flexible foreseeability guidelines).

60. To coin a phrase. *Cf.* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102 (N.Y. 1928) (Cardozo, C.J.).

Notwithstanding the *necessity* of foreseeability as a limitation on responsibility for the harmful consequences of negligent acts and omissions, the foreseeability of a risk and plaintiff is not itself a *sufficient* basis for liability in every case. That is, "special problems of principle or policy" may "justify the withholding of liability" in certain cases.[61] By way of example, whether a social host who provides a guest with "too much" alcohol before the guest attempts to drive home should be subject to negligence responsibility for an ensuing automotive accident is a question that courts (or legislatures) can best decide as a general rule, rather than permitting, indeed requiring, juries on an ad hoc basis to make such fundamental judgments about the propriety of this recurring form of complex social behavior.[62] As another example, a jury in a particular case might (or might not) consider it "negligent" for a check casher[63] or fast-food restaurant employee[64] to fail to surrender money demanded by a gunman threatening a hostage, but courts can probably better decide on a category basis whether the property interests of enterprises, together with society's interests in discouraging hostage taking, properly may be subordinated to the safety interests of hostages. As a final example, whether a passer-by should be subject to negligence liability for failing to help a stranger avoid injury (either an initial injury or aggravation) classically illustrates the kinds of global issues that courts, through duty rules, may properly decide to exclude in general from jury consideration.[65] Harm in all such cases is clearly foreseeable, but the kinds of choices among fundamental values and policies lurking within these types of cases suggest that courts should be able to determine, as a matter of legal principle, that defendants in such situations should be exempt from the normal reach of negligence claims. And duty rules do just that.

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61. Discussion Draft, *supra* note 1, § 6.

62. *See, e.g.*, Overbaugh v. McCutcheon, 396 S.E.2d 153, 158 (W. Va. 1990) (holding that social host who provides liquor to guest has no duty to third parties injured by intoxicated driving of former guest).

63. *See* Boyd v. Racine Currency Exch., Inc., 306 N.E.2d 39, 42 (Ill. 1973) (holding that there was no duty to patron to comply with robber's demands).

64. *See, e.g.*, Ky. Fried Chicken of Cal., Inc. v. Superior Court, 927 P.2d 1260, 1270 (Cal. 1997) (rejecting claim that restaurant owed duty to patron to comply with robber's demands).

65. *See, e.g.*, Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (holding that there was no duty to rescue drowning person who jumped into pit of water, even where defendant's taunting motivated decedent to make the jump).

II. DUTY RULES IN THE *RESTATEMENT (THIRD)*

A. The Restatement (Third)

The draft of the *Restatement (Third)* fails to include duty as an explicit element in its definition of the negligence cause of action, but it does separately recognize duty's role as an important, if "unusual," limitation on the reach of negligence. In order to understand the duty section, the draft of the *Restatement*'s structure must first be considered. The draft classifies tort liability according to the traditional tripartite division based on the culpability of the actor: Chapter 1 concerns Intent and Recklessness;[66] Chapter 2 addresses Negligence and Negligence Liability;[67] and Chapter 3 covers Strict Liability.[68] While issues of duty are sprinkled throughout Chapter 2,[69] and while treatment of nonfeasance and the duty of affirmative action is postponed until later in the *Restatement,* the two provisions that most directly involve the role of duty are sections 3 and 6. Section 3 ("Negligence Liability") provides in full: "An actor is subject to liability for negligent conduct that is a legal cause of physical harm."[70] And Section 6, entitled "Duty," provides:

> Even if the defendant's negligent conduct is the legal cause of the plaintiff's physical harm, the [defendant] is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff. Findings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability.[71]

The formulations of Sections 3 and 6 are what the duty debate is all about. Section 3 is significant for the glaring absence of any reference to duty in its black-letter definition of the negligence cause of action as Negligence-Cause-Damage. However, comment a does provide: "The language of 'subject to liability' acknowledges the possibility of various . . . duty limitations as contemplated by Section 6." Arguably, therefore, duty is included in the formal defi-

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66. *See* Discussion Draft, *supra* note 1, §§ 1-2.

67. *See id.* §§ 3-17.

68. *See* Preliminary Draft No. 2, *supra* note 2, §§ 18-23.

69. *See, e.g.,* Discussion Draft, *supra* note 1, § 17 cmt. h (observing that passengers may have no duty to protect potential victims from negligence of drivers, and gun sellers may have no duty to protect potential victims from improper use of guns).

70. *Id.* § 3. Section 4 defines negligence as the failure to exercise reasonable care and states that this determination is frequently determined on a cost-benefit basis. *Id.* § 4 & cmt. d. Section 5 explains the differing functions of courts and juries in negligence actions. *Id.* § 5.

71. *Id.* § 6.

nition of the negligence cause of action, but its presence lies muffled in a comment.

The first point of interest in Section 6 is its assertion that duty is an issue of law exclusively for the court. Thus, it is the *court* that determines the duty issue, based on "judicial recognition of special problems" that limit the normal reach of negligence doctrine. While noteworthy, this aspect of duty is doctrinally noncontroversial, for it is hornbook law that duty involves "legal" questions for the court.[72] But while this point of legal doctrine may be noncontroversial, how broadly the courts *apply* the duty concept is exceedingly controversial, for it involves the extent to which the courts open or close their doors to particular types of plaintiffs asserting particular types of claims for particular types of losses. The judge/jury aspect of Section 6 follows on the heels of the more general treatment of this important topic in Section 5, entitled "Judge and Jury." But Section 5 addresses the issue of when questions of fact and combined questions of law and fact give rise to jury resolution in individual cases; whereas, Section 6 addresses duty as a threshold doctrine excluding particular types of claims as a categorical matter in every case.[73]

The first controversial point of the Duty section (Section 6) arises structurally from its location *after* the sections on Negligence Liability (Section 3), Negligent (Section 4), and Judge and Jury (Section 5). This order of elements contrasts quite starkly with the conventional ordering of elements as Duty-Breach-Cause (Actual and Proximate)-Damage, in which duty logically precedes the notion of its breach. Indeed, Comment a to Section 6 acknowledges that "courts frequently say that establishing 'duty' is the first prerequisite in an individual court case . . . ."[74]

Another aspect of Section 6 that is related to the formal primacy issue just mentioned springs from the statements that the (no-) duty issue is "unusual," and "that there is a 'general duty' to 'exercise reasonable care,' to avoid subjecting others to 'an unreasonable risk of harm,' . . . ."[75] Comment a goes on to state that duty normally is a "non-issue" that "absent unusual circumstances does not require restatement on a case-by-case basis."[76] While all of these assertions in themselves are largely true, their phrasing

72. *See generally* DAN B. DOBBS, THE LAW OF TORTS §§ 225-26 (2000).
73. *See* Discussion Draft, *supra* note 1, § 6 cmt. h.
74. *See id.* § 6 cmt. a.
75. *Id.*
76. *Id.*

tends to diminish the significance of duty's role. In view of the frequency with which courts restate duty as the first formal element at the front of the classic definition of the negligence cause of action, sometimes even in garden-variety accident cases, the present formulation of Section 6 fails to convey the full extent of duty's power.

Finally, Section 6 may suggest that judges in individual cases have discretion to "find" that duty does or does not exist depending on the particular judge's views of relevant "principles or policy." Yet duty is neither discretionary nor a matter of fact to be "found," but a matter which must be "ruled" upon by the court according to the law. Certainly duty is based upon principles and policy, but the section needs to make the point that courts are bound to search out and apply the prevailing principles and policy of the law.

B. Does the Draft Restatement *Properly Restate Duty's Role in Negligence Law?*

The draft Restatement's structure and its formulation of section 6 may be criticized, as Goldberg and Zipursky have done, for failing to accord duty the primacy in negligence law that it occupies in fact. More particularly, this critique faults the draft for failing to acknowledge duty's traditional position as the formal, threshold element of the negligence cause of action, a definitional defect that masks duty's vital foundational role in the law of negligence. The doctrinal basis of this critique is that, by failing to include duty in the definition of the negligence claim, the draft fails to capture the elements of the tort of negligence as regularly propounded by the courts. As they have for decades, courts uniformly define the negligence cause of action as including four (or five) elements: Duty-Breach-Cause (Cause in Fact + Proximate Cause)-Damage. On this formulation there is today virtually no debate: The courts of almost every state consistently reiterate this standard formulation of the negligence cause of action.[77] Thus, if the purpose of a *Restatement* is to restate the law as it now stands, then it would seem that the *Restatement (Third)* should restate the law of negligence as the courts almost universally proclaim it now to be.

Restatements, of course, have a deeper role than slavishly parroting the most recent proclamations of doctrine from the courts. Whether this deeper function is styled law clarification or law re-

77. *See* Goldberg & Zipursky, *supra* note 3, at 658 n.1.

form, restatements serve an important role in helping courts to understand the principles of law they do and should apply, and to slough off the natural accumulation of encrusted doctrinal error. The *Restatement (Third) of Torts: Products Liability*,[78] for example, restated the basis of products liability law according to the principles of negligence,[79] rather than as a rule of "strict" liability which courts for a generation had proclaimed.[80] But the *Products Liability Restatement* was justified in ignoring repeated judicial characterizations of the liability rule only because the courts were doing one thing while saying quite another: They were applying principles of negligence while calling liability "strict." To clarify the law that courts actually were applying, therefore, the *Products Liability Restatement* properly "restated" the law as it stood in fact, as opposed to how it widely was described.[81]

There is some basis for applying such a "functional" approach (restating the law as courts do rather than as courts say) to negligence law. The draft *Restatement*'s characterization of duty as a "non-issue" in most negligence cases involving physical harm in fact is not unfair. In truth, in the vast majority of automotive accident, slip-and-fall, and other run-of-the-mill negligence cases brought today, the defendant never challenges its duty to avoid unreasonably subjecting the plaintiff to a foreseeable risk of harm. Such cases are instead defended on other elements—that the defendant's conduct was not unreasonable, or that the plaintiff's damages are less than were alleged. Typically left unchallenged by the defendant, the defendant's duty to the plaintiff is thus not ordinarily put into dispute and so is not an issue in the case. In this respect, the *Restatement* draft is correct in stating that duty is a non-issue in many negligence cases.[82]

The fact that the duty issue is atypical, however, does not mean that it is not an important element, and, hence, does not compel the conclusion that it should be excluded from the general

78. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

79. *Id.* § 1 cmt. a (stating that the definitions of design and warnings defects in Section 2 are based on the reasonableness test of negligence).

80. *See generally* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743 (chronicling the rise and fall of strict products liability).

81. *See id.*

82. "Occasions for judicial determination of a duty of care are infrequent, because in 'run of the mill' accident cases the existence of a duty may be—and usually is—safely assumed." Raymond v. Paradise Unified Sch. Dist., 31 Cal. Rptr. 847, 852 (Cal. Ct. App. 1963).

definition of the negligence cause of action.[83] Both cause in fact and proximate cause lie typically unchallenged (and, hence, are "non-issues") in garden-variety negligence cases, but this does not mean that proximate causation is not a vital element in every negligence case that properly should be restated as a necessary element in the definition of the negligence cause of action. Like proximate causation, duty frequently lies embedded in run-of-the-mill negligence cases; but, as with causation, the typically embedded nature of duty does not diminish its importance as a foundational element in every negligence case.

The essence of this critique of the *Restatement* draft is that it fails to accord full-bodied recognition of duty as an explicit, mandatory element (indeed, the *primary* element) of negligence law. The basis of this argument is that the draft is deficient because it fails to include duty as a separate, formal element in the definition of the negligence cause of action in Section 3, and because even Section 6 undercuts the significance of duty by characterizing no-duty determinations in a manner that suggests that they are largely indeterminate and subject to the discretionary whim of every court.[84] In short, the strength of the duty element is shortchanged in the current *Restatement* draft.

Criticizing the *Restatement* draft for embedding duty is in some ways quite unfair, for the draft does reflect what the courts to a large extent both do and say—which is to leave duty embedded as a non-issue in most cases, pulling it out for consideration only in the infrequent cases when it truly is an issue. And while duty is indeed excluded from the Negligence-Cause-Damage recitation of elements in Section 3, it does receive its own black-letter section adjacent to the basic negligence sections, unlike the cause and damage elements.[85] Moreover, the first sentence of the first comment to Section 3 states that duty limitations (together with defenses and immunities) are encompassed by the "subject to liability"

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83. The Discussion Draft provides that the existence of a general duty to exercise reasonable care is a "basic principle" that "absent unusual circumstances does not require restatement on a case-by-case basis." Discussion Draft, *supra* note 1, § 6 cmt. a.

84. *See generally* Goldberg & Zipursky, *supra* note 3, at 660-61 (critiquing the *Restatement* draft along these lines).

85. As with duties of affirmative action, draft sections on causation and damages have yet to be circulated. However, it is likely that these sections will be located some distance from the basic negligence and duty treatments. *See* Discussion Draft, *supra* note 1, §§ 3-6. Indeed, details on the damages element of the negligent cause of action are likely to be addressed, if at all, outside of the present *Restatement (Third) of Torts* project. Thus, the fact that duty has its own black-letter section so close to the core negligence sections helps compensate for its exclusion from Section 3's black letter.

phrase, and duty's black-letter treatment in Section 6 is there cross-referenced.[86] Thus, while including duty in its conventional location at the head of the classic list of negligence elements would indeed enhance the present *Restatement* draft, its current formulation of duty rules is not implausible.

These arguments in support of the *Restatement* draft notwithstanding, the "belittling" critique has merit. As previously mentioned, duty is the glue of interpersonal relationships in a civilized society, and the existence of a right-duty relationship between the plaintiff and defendant is the fundamental nexus that gives coherence to negligence claims. Benjamin Cardozo's explanation in *Palsgraf* of the primacy of duty provides a coherent conceptual foundation to negligence law that is too important to be relegated to second-level consideration.[87] The draft by no means hides the duty element entirely from view, since duty is cross-referenced in a comment to Section 3 and then, in Section 6, is treated in a section of its own. But relegating such an important element to cross-reference comment status in the section defining the negligence cause of action undercuts the salience of the duty element. In sum, the *Restatement* draft fairly may be faulted for failing to include duty in the black-letter definition of the negligence cause of action in Section 3.

III. CONCLUSION

Because courts and commentators in the twentieth century failed to develop a well-defined role for duty, the current debate over how the duty element in negligence law may best be formulated in the *Restatement (Third)* should be very helpful to the evolving law of torts. Because the nature of the duty concept has for so long remained unclear, the courts have manipulated it, sometimes as an expansionary device, other times as the basis for liability restriction, according to the political winds of the times. But duty doctrine is too important to be left ill-defined. Critiquing the formulation of duty rules in the draft *Restatement (Third) of Torts,* Professors Goldberg and Zipursky subject the role of duty in negligence law to its closest scrutiny in many years. Their inquiry has unquestionably revivified duty's foundational significance in the law of negligence.

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86. Discussion Draft, *supra* note 1, § 3 cmt. a.

87. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 159-67 (1995).

How the duty element may best be formulated in restating the law of negligence may be viewed from many windows, and an examination of the *Restatement* draft reveals that its present formulation is broadly correct in many respects. While the draft defines the negligence cause of action in general terms without explicit black-letter reference to duty, the duty/no-duty issue receives formal black letter recognition close by. The draft *Restatement*'s duty section undoubtedly needs some tinkering to clarify some important points, but the duty section considered by itself is largely sound. Yet the Restatement draft may be faulted for failing to accord duty its rightful place as an explicit element at the front of the negligence parade.

Whether the Goldberg-Zipursky effort to move the *Restatement*'s treatment of the duty issue toward the ways of righteousness will ultimately be successful is difficult to predict. My guess is that their duty exhortations will encourage the Reporters to strengthen the duty formulations somewhat, yet I suspect that potent inertial forces will thwart any large-scale redefinitions or restructuring of the relevant black-letter sections. But even if this dire prediction proves true, the prodigious efforts of Professors Goldberg and Zipursky to alter the *Restatement* to reflect the primacy of duty in negligence law is much more than a quixotic tilt at an academic windmill. Courts will surely find and use the focused Goldberg-Zipursky proposals on how duty rules may be ordered, and on how they may be phrased.[88] However duty rules may be formulated in the *Restatement (Third),* even if they remain embedded, chained like Prometheus to a prison rock, the present debate assures that duty, the vital first principal of the law of negligence, is now unbound. Duty rules.

88. In an Appendix to their article, Goldberg and Zipursky provide an excellent set of proposals on how such principles might be formulated in the *Restatement (Third) of Torts.* Goldberg & Zipursky, *supra* note 3, app. at 737-51.